Supreme Court, U.S.
FILED
MAY 20 2002
OFFICE OF THE CLERK

(3)

No. 01-1473

IN THE

Supreme Court of the United States

HUNT TRUCK LINES, INCORPORATED,
An Iowa Corporation,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
and HOWARD MCDOUGALL, trustee,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

HERVEY H. AITKEN, JR.*
SUEYOUNG CHO
THIEMANN, AITKEN & VOHRA, L.L.C.
908 King Street, Suite 300
Alexandria, Virginia 22314
(703) 836-9400

MARK A. SPOGNARDI
MCBRIDE BAKER & COLES
500 West Madison, 40th Floor
Chicago, Illinois 60661-2511
(312) 715-5766

* Counsel of Record

Attorneys for Hunt Truck Lines, Inc.

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

15 pg

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	2
I. THE SEVENTH CIRCUIT'S RULE IS SUBSTANTIVELY DIFFERENT FROM THE RULE OF ALL OTHER CIRCUITS	2
II. THERE IS A MEANINGFUL CONFLICT BETWEEN THE SEVENTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL JUSTIFICATION AND THE SPECIAL CIRCUMSTANCES TESTS, AND THE APPLICATION OF THE FIVE-FACTOR TEST BY THE MAJORITY OF CIRCUITS	4
III. HUNT DID NOT WAIVE ITS ARGUMENT THAT THE SEVENTH CIRCUIT SHOULD APPLY THE FIVE-FACTOR TEST AS ADOPTED BY THE MAJORITY OF CIRCUITS	7
IV. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISION IN *COOTER & GELL V. HARTMARX CORP*	8
A. There was no error of law	8
B. There was no clearly erroneous assessment of evidence	9
CONCLUSION	10
APPENDIX	1a

TABLE OF AUTHORITIES

CASES — Page

Anderson v. Vessemer City, 470 U.S. 564 (1985) 10

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 8, 10

Gary v. New England Tel. and Tel. Co., 792 F.2d 251 (1st Cir. 1986) 3

STATUTES

29 U.S.C. § 1132(g)(1) 2, 3

29 U.S.C. § 1381(a) 8, 1a

29 U.S.C. § 1382 ..... 8, 9, 1a

IN THE

Supreme Court of the United States

No. 01-1473

HUNT TRUCK LINES, INCORPORATED,
An Iowa Corporation,
Petitioner,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION FUND,
and HOWARD MCDOUGALL, trustee,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

Petitioner, Hunt Truck Lines, Inc. ("Hunt") submits this Reply Brief to address the matters asserted in the Brief in Opposition filed by Respondents, Central States Southeast and Southwest Areas Pension Fund and Howard McDougall, trustee (collectively referred as "Central States").

The heart of this litigation is that Central States violated the most fundamental procedural due process requirement of ERISA by commencing a lawsuit to collect interim withdrawal liability payments before it had issued a proper Notice for Demand for Payment of Withdrawal Liability ("Notice and Demand") to Hunt. Central States **knew** its litigation was six weeks premature, and as the district court found, Central States went so far as to "contradict its own

affidavit concerning the issue of withdrawal" (Petitioner's App. at 13a, n.1), in a futile effort to salvage its lawsuit. Central States steadfastly refused to terminate this case and issue a valid Notice for Demand compounding its initial error. Instead, Central States, with $17 billion in assets and unlimited legal resources, caused Hunt to needlessly incur more than $100,000.00 in legal defense costs to secure its procedural rights guaranteed by the federal statute. Given these facts, the district court awarded attorneys' fees to Hunt under the five-factor test. However, the Seventh Circuit reversed it by applying both the substantial justification and special circumstances tests.

In the Petition for Certiorari, Hunt requests this Court to grant its petition because: (1) there is a substantive split among the circuits in reviewing lower courts' decisions to grant or deny attorneys' fees under 29 U.S.C. § 1132(g)(1); and (2) the Seventh Circuit erroneously reversed the district court's determination by substituting its own view for the district court's view in violation of this Court's precedent.

Central States argues that these tests are essentially the same, are not outcome determinative, and, as these tests are applied to the present case, there is no meaningful conflict among the circuits. Respondent's Brief in Opposition, at 6 to 7. Considering that Central States argued that the court should adopt the substantial justification test rather than the five-factor test (Petitioner's App. at 13a), Central States' position is self-contradictory. Central States obviously believed the former test favored its position. As will be discussed here, the three tests are different, and in fact, created different results.

I. THE SEVENTH CIRCUIT'S RULE IS SUBSTANTIVELY DIFFERENT FROM THE RULE OF ALL OTHER CIRCUITS.

The majority of the circuits adopt the five-factor test in determining whether to grant or deny attorneys' fees under 29

U.S.C. § 1132(g)(1). Petition for Certiorari, at 11 to 13. Under this test, a district court's decision to grant or deny attorneys' fees is determined based on five factors: (1) the opposing party's culpability or bad faith; (2) the ability of the opposing party to satisfy an award of attorneys' fees; (3) the deterrent effect of an award of attorneys' fees against the opposing party; (4) whether the party requesting fees sought . . . to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions. Petitioner's App. at 12a.

In contrast, the substantial justification test requires a court to review only the last factor of the five factors because it allows a court to deny attorneys' fees when the opposing party's position is substantially justified. It does not require an analysis of the first four factors, three of which test the opposing party's culpability, conduct and ability to pay. In rejecting the substantial justification test, the First Circuit in *Gary v. New England Tel. and Tel. Co.*, 792 F.2d 251 (1st Cir. 1986) stated that, although there is similarity between ERISA and EAJA, "a **multi-faceted approach** [five-factor test] is more desirable when fees are to be assessed against parties other than the United States." *Gary*, 792 F.2d at 259 (emphasis added). Clearly, the application of one factor, as opposed to five, to determine whether to grant or deny attorneys' fees invites subjectivity, misuse or abuse of discretion. None of the circuits, except for the Seventh Circuit, applies the substantial justification test in determining attorneys' fees under 29 U.S.C. § 1132(g)(1).

Under the special circumstances test, a court would grant attorneys' fees to a prevailing party unless there are special circumstances that render a fee award unjust. Except for the Seventh, Eighth and Ninth Circuits, all of the other circuits strictly follow the five-factor test. Further, in the Eighth and Ninth Circuits, the special circumstances exception is available only for prevailing plan beneficiaries. Only the

Seventh Circuit uses the special circumstances test as a presumption favoring defendant employers. However, once again, contrary to the objective guidelines provided by the multi-faceted five-factor test, the special circumstances test subjectively allows the court to look at any factors it deems relevant. The special circumstances test does not require an analysis of the opposing party's culpability, conduct and ability to pay. This begins to explain how the special circumstances test, as applied in this case, could deny Hunt its attorneys' fees, despite the rule's presumption favoring a grant of attorneys' fees to Hunt.

II. THERE IS A MEANINGFUL CONFLICT BETWEEN THE SEVENTH CIRCUIT'S APPLICATION OF THE SUBSTANTIAL JUSTIFICATION AND THE SPECIAL CIRCUMSTANCES TESTS, AND THE APPLICATION OF THE FIVE-FACTOR TEST BY THE MAJORITY OF CIRCUITS.

As Central States argues, it is true that the Seventh Circuit views these two tests as the same because the Seventh Circuit allows its district courts to use any of these tests. Petitioner's App. at 5a. However, it is the application of the substantial justification and the special circumstance tests by the Seventh Circuit which is **in conflict with** the rule of the majority circuits.

In this case, the application of different tests brought different results. The district court made proper findings under the five-factor test. *Id.* at 12a to 13a. In awarding attorneys' fees, the district court concluded:

> [F]ees are warranted largely because Central States was culpable in "jumping the gun" and prematurely issuing the Notice for Demand. The initial culpability was exacerbated by the continued insistence on this position in this litigation.[1] Simply stated, Central States could

have terminated this case and re-issued a valid notice and demand. An award of attorneys' fees will serve to deter such culpable behavior and will serve to heighten the concern for adhering to the statutory framework, which, as we previously have noted, gives Central States (and others like it) a significant power to unilaterally demand interim payments.

---

[1] In an effort to avoid the argument that it prematurely issued the notice, Central States also contradicted its own affidavit concerning the issue of the withdrawal.

Id. at 13a. The district court properly applied the five-factor test and found that Central States was culpable in "jumping the gun," by prematurely issuing the Notice for Demand in violation of the statutory pre-requisite (factor 1); there was no question that Central States has the ability to pay attorneys' fees (factor 2); the award of the attorneys' fees would "deter" this culpable behavior by Central States (factor 3); the fee award would serve to heighten the concern for adhering to the statutory framework (factor 4); and Central States' position in the litigation was not justified, because Central States "could have terminated this case by simply re-issuing a valid notice" instead of continuing this unlawful litigation against the employer (Hunt) for interim payments (factor 5). Petition for Certiorari, at 22 to 23.

As applied to this case, the five-factor test relied on by the district court warranted a fee award to Hunt, and, according to the Seventh Circuit, the substantial justification and the special circumstances tests did not. Clearly, the Seventh Circuit's use of different tests resulted in a different outcome.

In applying the substantial justification test, the Seventh Circuit simply used one factor of the five factors, namely the relative merits of the parties' position (fifth factor). Considering that the district court emphasized the culpability of the losing party, Central States, a criteria in the first, third and

fourth factors, the Seventh Circuit's decision highlights the difference between the five-factor test and the substantial justification test because the Seventh Circuit did not address the culpability of Central States.

With regard to the special circumstances test, the difference is even more significant. Here, the district court's five-factor test properly focused on the losing-plaintiff Central States' conduct regarding its culpability in "jumping the gun" and prematurely issuing the Notice for Demand. In contrast, the Seventh Circuit improperly shifted the focus to the conduct of the prevailing party, Hunt, suggesting Hunt's defense was merely footdragging to avoid paying final withdrawal liability. This shift in focus on conduct is the essence of the fundamental difference between the five-factor test and the Seventh Circuit's application of the special circumstances test. That is, the five-factor test provides an objective analysis focused on the losing party, Central States' conduct, while the Seventh Circuit used the special circumstances test to focus on the prevailing party, Hunt's conduct, avoiding any focus on Central States' culpability.[1]

Simply put, the Seventh Circuit held that Central States' "knowing" violation of ERISA's due process procedure (Petitioner's App. at 68a to 69a) does not provide a basis for awarding attorneys' fees because the court believed that ultimately Hunt would have to pay withdrawal liability. In essence, the Seventh Circuit felt the end result of securing withdrawal liability payments could justify or excuse the "illegal means" used.

While ERISA grants significant power to a pension fund to unilaterally demand interim payments, Central States abused this power by knowingly issuing a premature notice. *Id.* By

---

[1] This is a significant shift because it was patently incorrect for the Seventh Circuit to conclude that Hunt's conduct in seeking to dismiss this unlawful complaint, which Hunt prevailed upon, constituted misconduct.

reversing the district court's decision under the substantial justification and the special circumstances tests, the Seventh Circuit imposed a subjective analysis that focused on the conduct of the prevailing party, Hunt, while ignoring three of the five factors in the five-factor test which focus on the culpability of the losing party, Central States. This one-sided selective analysis undermines the objective guidance provided by the five-factor test. Clearly, as applied in this case, there is a meaningful conflict between the Seventh Circuit's application of the substantial justification and the special circumstances tests, and the application of the five-factor test by the majority of circuits that warrants this Court's review.

III. HUNT DID NOT WAIVE ITS ARGUMENT THAT THE SEVENTH CIRCUIT SHOULD APPLY THE FIVE-FACTOR TEST AS ADOPTED BY THE MAJORITY OF THE CIRCUITS.

Central States' claim that Hunt waived its argument that the five-factor test should be applied is incorrect. The district court's opinion noted that "Central States favors the "substantially justified" test and Hunt favors the "five-factor" test," and held that under both of these tests, Hunt should receive reasonable attorneys' fees. *Id.* at 13a. Hunt presented its argument as to the differences of these tests to the court. Hunt did not vigorously dispute that the Seventh Circuit should not use the substantial justification or the special circumstances tests because the district court held Hunt prevailed under both tests. Accordingly, Hunt did not waive this argument.

IV. THE SEVENTH CIRCUIT'S DECISION DEFIES THIS COURT'S DECISION IN *COOTER & GELL v. HARTMARX CORP.*

This Court in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) held that when the standard of review is abuse of discretion, an appellate court cannot substitute its view for the district court's view, and a district court can be reversed only, "if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Here, the Seventh Circuit defies this Court's rule by reversing the district court's decision even though the district court did not base its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence.

A. There was no error of law.

Central States argues that prior to *Hunt I*, the Seventh Circuit's decisions allowed a pension fund to collect interim payments unless the employer showed: (1) the fund lacked a colorable claim; and (2) the employer would suffer irreparable harm. Accordingly, because Hunt did not make either argument, the Seventh Circuit was correct in determining that Central States' reliance on this pre-*Hunt I* rule provided substantial justification to its position. Respondent's Brief in Opposition, at 3.

This argument misstates the law. Under the clear statutory law, Central States had no **legal** right to sue. ERISA Section 4201(a), in pertinent party, provides:

> **[I]f an employer withdraws** from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1381(a) (emphasis added). ERISA Section 1382, in pertinent part, provides:

> **[W]hen an employer withdraws** from a multiemployer, the plan sponsor in accordance with this part shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.

29 U.S.C. § 1382 (emphasis added). This is a due process requirement imposed by the statute rather than a court-created rule. The district court found that the statute clearly reflects a scheme whereby the plan must first wait until a withdrawal has occurred before issuing a Notice and Demand. Petitioner's App. at 91a. Violation of this clear statutory mandate was grounds for the district court to find that Central States was "culpable in jumping the gun." Thus, there was no substantial justification for Central States' position. Moreover, the Seventh Circuit's creation of this substantial justification not only was contrary to the district court's analysis which rejected the pre-*Hunt I* law as "different in kind" from the issue in this case (Petitioner's App. at 94a), but was an improper substitution of its view for the view of the district court.

B. There was no clearly erroneous assessment of evidence.

Central States argues that the district court abused its discretion when it did not consider that Hunt would be ultimately liable for "final" withdrawal payments, which the Seventh Circuit relied upon as the "special circumstances" in this case.[2] Respondent's Brief in Opposition, at 8 to 9.

However, the facts show that the district court considered the issue of final withdrawal liability. In awarding attorneys'

---

[2] Hunt believes that it will not be held liable for final withdrawal liability. This issue was argued to a different panel in the Seventh Circuit on January 25, 2002, and has not yet been decided.

fees to Hunt, the district court noted that its decision to grant fees was not inconsistent with Judge Shudar's decision and the arbitrator's decision regarding final withdrawal liability. Petitioner's App. at 13a to 14a. The district court was well aware of the issue of final withdrawal liability. By reversing the district court's decision, the Seventh Circuit, once again, substituted its own view for the district court's opinion, which this Court clearly prohibited in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) and *Anderson v. Vessemer City*, 470 U.S. 564 (1985).

CONCLUSION

This case presents this Court with a rare opportunity to provide a uniform, objective standard for the circuit courts to award attorneys' fees under ERISA on a clear and undisputed factual record. This case also presents this Court with an opportunity to provide clarification as to how the circuit courts should conduct a meaningful review under the abuse of discretion standard.

Therefore, the petition for writ of certiorari should be granted.

Respectfully submitted,

HERVEY H. AITKEN, JR.*
SUEYOUNG CHO
THIEMANN, AITKEN & VOHRA, L.L.C.
908 King Street, Suite 300
Alexandria, Virginia 22314
(703) 836-9400

MARK A. SPOGNARDI
MCBRIDE BAKER & COLES
500 West Madison, 40th Floor
Chicago, Illinois 60661-2511
(312) 715-5766

* Counsel of Record

Attorneys for Hunt Truck Lines, Inc.

APPENDIX

APPENDIX

29 U.S.C. § 1381(a) Withdrawal Liability Established.

If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

29 U.S.C. § 1382 Determination and Collection of Liability; Notification of Employer.

When an employer withdraws from a multiemployer, the plan sponsor in accordance with this part shall—

(1) determine the amount of the employer's withdrawal liability,

(2) notify the employer of the amount of the withdrawal liability, and

(3) collect the amount of the withdrawal liability from the employer.